Record

October 2004 Federal Election Commission Volume, 30

CANDIDATE GUIDE SUPPLEMENT

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Using this Supplement

The purpose of this supplement is to offer a summary of the most recent developments in the Commission's administration of federal campaign finance law relating to candidate committees. The following is a compilation of articles from the FEC's monthly newsletter covering changes in legislation, regulation and advisory opinions that affect the activities of candidate committees. It should be used in conjunction with the FEC's June 2004 *Campaign Guide for Congressional Candidates and Committees*, which provides more comprehensive information on compliance for candidate committees.

Legislation

Commission Sends Annual Legislative Recommendations to President and Congress

On April 29, 2004, the Commission transmitted to Congress and the President its annual recommendations for changes to the Federal Election Campaign Act (the Act). Of the 12 recommendations transmitted, the Commission identified four as high priority:

- Restoring "any lawful purpose" as a permissible use of campaign funds under 2 U.S.C. §439a, including specifically the donation of federal campaign funds to state and local races (subject to state law);
- Increasing the contribution limit under 2 U.S.C. §432(e)(3)(B) that authorized committees may give to authorized committees of other candidates, from $1,000 per election, to $2,000 per election;
- Replacing the "reason to believe" terminology used in the Act to describe the Commission's decision to open an investigation with terminology that sounds less accusatory; and
- Requiring Senate campaign committees to file electronically at the same thresholds as House and Presidential campaign committees.

Among the other eight recommendations transmitted this year are the following new recommendations:

- Revising the prohibitions on fraudulent misrepresentation of campaign authority to capture all persons falsely purporting to act on behalf of candidates and real or fictitious political committees and organizations;
- Revisiting the pay levels for the Commission's General Counsel and permitting the Commission to create Senior Executive Service positions to help recruit and retain key personnel;
- Modifying the definition of federal election activity at 2 U.S.C. §431(20)(A)(iv) to allow state, district and local party committees to determine each pay period (rather than each month) whether employees must be paid using federal or nonfederal funds; and
- Clarifying the circumstances under which federal candidates may solicit, receive or spend funds for nonfederal candidates and other types of political accounts, including recall elections, referenda and initiatives, legal defense funds and related activities.

Additionally, the Commission updated four recommendations that have been put forward in past years:

- Harmonizing the limits for multicandidate political committees with those of non-multicandidate committees by indexing the multicandidate limits for inflation;
- Stabilizing the Presidential public funding program to avert possible shortfalls in future election cycles;
- Increasing and indexing for inflation all pre-BCRA registration and reporting thresholds to ease the registration and reporting burdens on smaller political committees that may lack the resources and expertise to comply with the Act; and
- Making permanent the Administrative Fine program for violations of the law requiring timely reporting of receipts and disbursements.

The full text of the Commission's 2004 legislative recommendations is available on the FEC web site at http://www.fec.gov/pages/legislative_recommendations_2004.htm.

—Dorothy Yeager

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Advisory Opinions

AO 2004-3
Conversion of Authorized Committee to Multicandidate Committee

Dooley for the Valley, a multicandidate committee that was formerly U.S. Representative Calvin M. Dooley's principal campaign committee, may keep its status as a multicandidate committee. However, funds the committee received while it was a principal campaign committee may only be spent for the four permissible uses of campaign funds provided for in the Federal Election Campaign Act (the Act).

The Act and Commission Regulations

The Act defines a "multicandidate committee" as a political committee that has been registered with the FEC for at least six months, has received contributions from more than 50 persons and, except for a state political party organization, has made contributions to at least five federal candidates. 2 U.S.C. §441a(a)(4). Nothing in the Act or Commission regulations explicitly addresses the conversion of a candidate's authorized committee into a multicandidate committee. However, in past advisory opinions, the Commission permitted a principal campaign committee to become a multicandidate committee. AOs 1994-31, 1993-22, 1988-41, 1987-11, 1985-30, 1985-13, 1983-14, 1982-32 and 1978-86. See also AO 2000-12.

The Act lists four permissible uses for contributions received by a federal candidate:

- Otherwise authorized expenditures in connection with the candidate's campaign for federal office;
- Ordinary and necessary expenses incurred in connection with the

duties of the individual as a federal officeholder;
- Contributions to charitable organizations described in 26 U.S.C. §170(c); and
- Unlimited transfers to national, state or local political party committees.

2 U.S.C. §439a(a); 11 CFR 113.2(a), (b) and (c).[1]

In the Bipartisan Campaign Reform Act of 2002 (BCRA), which took effect on November 6, 2002, Congress deleted "any other lawful purpose" from the list of permissible uses of campaign funds, making this list of permissible uses exhaustive. See AOs 2003-30 and 2003-26.

Transition to Multicandidate Committee

On September 2, 2003, Representative Dooley announced his decision to retire from Congress as of January 2005. His principal campaign committee, Dooley for Congress, filed an FEC Form 1M, Notification of Multicandidate Status, on September 30, and subsequently filed an amended Statement of Organization reflecting the new status as a multicandidate committee and changing the committee's name to Dooley for the Valley (the Committee).

The BCRA's amendments to the Act do not *per se* bar an authorized committee from becoming a multicandidate committee. When the Committee was converted to an unauthorized committee after Representative Dooley ceased to be a federal candidate, it became a multicandidate committee because it had already met the requirements for multicandidate committee status. 2 U.S.C. §441a(a)(4). See AOs 1993-22, 1988-41 and 1985-30. Accordingly, the Committee may accept contributions of up to $5,000 per contributor per calendar year. 2 U.S.C. §441a(a)(1)(C).

However, when the Committee converted to a multicandidate committee it had a large amount of cash-on-hand—money that it had raised when it was a principal campaign committee. The Act's restrictions on the use of campaign funds apply expressly to "contribution[s] accepted by a candidate." 2 U.S.C. §439a(a). Thus, funds that the Committee received when it was a principal campaign committee must be spent only for the permissible uses listed above, and must not be converted to the personal use of any individual. 2 U.S.C. §439a(b).

In addition, the Committee must limit to $1,000 per election any contributions it makes to other federal candidates using funds it received while it was a principal campaign committee. 2 U.S.C. §432(e)(3)(B). The Act and regulations provide that, in general, a political committee that supports more than one candidate may not be designated as a principal campaign committee or authorized committee of a candidate. 2 U.S.C. §432(e)(3)(A); 11 CFR 102.12(c)(1) and 102.13(c)(1). A candidate's committee may contribute only up to $1,000 per election to another federal candidate's principal campaign committee or authorized committee without being considered to "support" another candidate. 2 U.S.C. §432(e)(3)(B); 11 CFR 102.12(c)(2) and 102.13(c)(2).

The Committee may, however, use its other funds—funds not from contributions received while it was a principal campaign committee—in a manner consistent with lawful uses by any other multicandidate committee. Therefore, contributions and other funds received after the Committee's September 30, 2003, conversion date may be spent for purposes other than the four uses listed above, as long as the Committee complies with the other provisions of the Act and Commission regulations.

Determining the Sources of Committee Funds

If the Committee makes disbursements that, in total, exceed the amount it received since it became a multicandidate committee, then it will be considered to be spending funds it received as a principal campaign committee. The spending of amounts exceeding its post-conversion receipts will be subject to 2 U.S.C. §§439a and 432(e)(3)(B).

When the Committee spends funds from its cash-on-hand as of September 30, 2003, that cash-on-hand figure will be reduced by the amount of the disbursements that are lawful under the Act's restrictions on principal campaign committees. As a practical matter, this means that, once a permissible disbursement of pre-conversion funds has been determined to have been made, that disbursement will not be included in total post-conversion disbursements for the purposes of determining the source (*i.e.*, pre-or post-conversion) of any subsequent disbursement.

Refunds

If the Committee made any contribution that would constitute an impermissible use of funds by a principal campaign committee using funds that it received while it was a principal campaign committee, then it must seek a refund.[2] The

[1] *Campaign funds must not be converted to "personal use" by any person. 2 U.S.C. §439a(b)(1). Commission regulations define "personal use" as "any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder." 11 CFR 113.1(g); 2 U.S.C. §439a(b)(2).*

[2] *The amounts of any refunds received by the Committee will not count toward total post-conversion receipts in determining whether total post-conversion disbursements exceed post-conversion receipts. However, any permissible portion of a disbursement after the receipt of a refund (for example, $1,000 of a $5,000 contribution to a federal candidate after $4,000 has been refunded) will draw down the pre-conversion cash-on-hand.*

Committee cannot make donations to nonfederal candidates and other non-party committees for state and local elections from funds it received as a principal campaign committee, because these donations would not be a permissible use of a candidate's campaign funds. 2 U.S.C. §439a. Such donations are only permissible in the furtherance of a candidate's campaign.[3] Representative Dooley was no longer a candidate for re-election to federal office after the conversion date and the donations would not fit into any of the categories of permitted uses in 2 U.S.C. 439a(a).

Date Issued: March 11, 2004; Length: 5 pages.

—*Amy Kort*

AO 2004-8
Severance Pay Awarded to Employee Who Resigns To Run for Congress

In keeping with its past practice, the American Sugar Cane League (ASCL) may provide severance pay and health insurance benefits to a former executive who is running for Congress without violating the Federal Election Campaign Act's (the Act) prohibition on contributions by corporations.

Background

ASCL, a nonprofit corporation representing Louisiana sugar cane growers and processors, plans to provide Charles Melancon, its former President and General Manager, a proposed severance package of full salary and full health insurance coverage for one year. Mr. Melancon, who held his position with ASCL for 11 years, resigned on February 20, 2004, in order to become a candidate for the U.S. House of Representatives.

ASCL has offered severance benefits to certain former employees since 1987. While there is no written policy for offering severance benefits and no formula for the calculation of those benefits, ASCL considers such factors as the position held, the length of time employed and the evaluation of job performance in determining whether to offer severance benefits and the size of those benefits. The content of severance packages granted to employees in the past varies. For example, a Vice President and General Manager with 15 years tenure received 3 months pay without continuation of health benefits; more recently, an employee with a total of 24 years of service, including 16 years as Vice President and Director of Research, received one year's full pay and health benefits coverage, his company-owned computer and the option to purchase his company owned car for its "Blue Book" value. In its request, ASCL noted that the severance package it is prepared to offer Mr. Melancon is identical to the package individual board members considered for him in 2001 when there was no prospect of his becoming a federal candidate.

Analysis

As an incorporated entity, ASCL is prohibited from making any "contribution or expenditure" in connection with a federal election 2 U.S.C. §441b(a); 11 C.F.R. 114.2(b)(1). The term "contribution" includes "any gift, loan, advance or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. §431(8)(A). Thus, ASCL may only provide Mr. Melancon with the proposed severance package if it does not constitute a contribution under the Act or Commission regulations.

The Act also prohibits the conversion of campaign funds to any "personal use." If a third party pays a candidate's expenses that would otherwise be deemed "personal use" expenses, the payments are considered contributions unless the third party would have made the payments "irrespective of the candidacy." 11 CFR 113.1(g)(6). For example, compensation payments are considered contributions unless:

- The compensation results from *bona fide* employment that is genuinely independent of the candidacy;
- The compensation is exclusively in consideration of services provided by the employee as a part of this employment; and
- The compensation does not exceed the amount that would be paid to any other similarly qualified person for the same work over the same period of time.

Applying these criteria, ASCL's proposed severance package will not result in a prohibited corporate contribution. ASCL has a sufficient corporate record of providing severance packages to departing employees to demonstrate that the package for Mr. Melancon relates exclusively to services rendered in his *bona fide* employment with ASCL. Additionally, the proposed package appears to be proportionate to past severance packages offered by ASCL.

Mr. Melancon's proposed severance package differs from a proposal for partial paid leave considered in AO 2000-1, where the Commission determined that partial paid leave for a federal candidate would not be compensation "irrespective of the candidacy" because the decision to grant the request was solely at the discretion of the firm and based on factors not exclusively tied to services provided by the employee. In contrast, while the determination by ASCL was discretionary in part, it focused on factors related solely to Mr. Melancon's service, such as length of service, position and job performance. Moreover, the fact that a similar package was proposed for Mr. Melancon years before he considered running for office is additional evidence that ASCL's

[3] *See the* Explanation and Justification *for the regulations at 11 CFR Part 113 (67 FR at 76975), where the Commission explained that such donations are permissible "[i]n furtherance of a Federal candidate's election."*

proposed package is compensation "irrespective of the candidacy."

Concurring Opinion

Commissioner McDonald issued a concurring opinion on May 6, 2004.

Date Issued: April 30, 2004; Length: 5 pages.

—Amy Pike

AO 2004-10 "Stand By Your Ad" Disclaimer Requirements for Radio Advertisements

A ten-second message sponsored by a federal candidate and read live on the air by a Metro Networks reporter must include the disclaimer statement required for candidate-sponsored radio ads; however, as an exception to the general rule, a Metro Networks reporter may read the required "stand by your ad" statement, rather than the federal candidate authorizing the sponsorship message.

Background

Under the Bipartisan Campaign Reform Act's so-called "stand by your ad" requirement, radio advertisements authorized by a federal candidate must include "an audio statement by the candidate" that identifies the candidate and states that he or she has approved the communication. 11 CFR 110.11(c)(3)(i). The message need not be read live in real time by the candidate, but the candidate must speak the required authorization statement.

Metro Networks is a national company that provides more than 2,000 radio stations throughout the United States with live traffic, news, sports and weather reports. Metro Networks generates revenue by selling ten-second "live read" sponsorship messages that the company's reporters read at the end of their reports. An "opening mention" precedes the actual report and also identifies the person purchasing the sponsorship message.

Metro Networks intends to market the ten-second sponsorship messages to federal candidates. However, Metro Networks stated that the live nature of the reports and limitations of their broadcasting equipment make it "physically impossible" for them to include any statement spoken by a candidate himself or herself. The reports are produced live in Metro Networks studios and from mobile units and aircrafts with Metro Networks reporters interacting live in real time with radio station personnel. Therefore, Metro Networks asserted that its reporter would be able to read a statement for a sponsoring candidate, but Metro Networks would not be equipped to play a recorded voice of a candidate.

Analysis

The Commission has long recognized that in certain circumstances it is impracticable to provide a full disclosure statement in the prescribed manner. For example, an exception in Commission regulations covers skywriting, water towers, wearing apparel or other means of displaying an advertisement when full application of the disclaimer requirement would be "impracticable." 11 CFR 110.11(f)(1)(ii)

In this case, the specific physical and technological limitations Metro Networks describes make it impracticable to require the approving candidate to speak the "stand by your ad" statement himself or herself. Thus, while the disclaimer is required, it is permissible for a Metro Networks reporter to speak for the candidate, or candidates, who authorized the advertisement.[1] This approach is practical and as faithful as possible to the "stand by your ad" statute, while avoiding unnecessary burdens on political speech that could result from a rigid application of all disclaimer provisions in all instances. See AO 2004-1.[2]

An appropriate disclaimer statement to be read by the Metro Networks reporter would be, "Paid for by the committee to re-elect candidate ABC. ABC approved this message."

—Kathy Carothers

AO 2004-14 Federal Candidate's Appearance in Public Service Announcements

U.S. Representative Tom Davis may appear in public service announcements (PSAs) to benefit the National Kidney Foundation (the Foundation) by promoting the Cadillac Invitational Golf Tournament. Because the funds raised through the tournament are solely for charitable purposes, Representative Davis's appearance in the PSAs will not be a solicitation of funds in connection with an election, subject to the requirements of the Federal Election Campaign Act (the Act). 2 U.S.C. §441i(e)(1). The PSAs will also not constitute a "coordinated communication," resulting in an in-kind contribution to Representative Davis, because his Congressional office will pay for the costs of taping the announcements. See 11 CFR 109.21.

Background

Representative Davis, who is seeking re-election in the November 2, 2004, general election, has appeared in PSAs promoting the Cadillac Invitational Golf Tournament for the past three years. The tournament is strictly a charitable fundraising event held annually to benefit the Foundation, which does

[1] *The Commission assumes for the purposes of this request that the federal candidate would not be physically present with the reporter, and thus would not be available to read the statement.*

[2] *AO 2004-1 addressed the "stand by your ad" requirement for a television communication authorized by two federal candidates. The Commission permitted one candidate to speak for both candidates so long as the approval statement conveyed that both candidates approved the advertisement.*

not engage in any activity in connection with an election, including voter registration, get-out-the-vote activity or generic campaign activity. The PSAs will not expressly advocate Representative Davis's election or make any reference to his candidacy. Representative Davis's Congressional office will pay for the taping of the announcements, and they will be cablecast without a fee.

Analysis

The two issues concerning the application of the Act to Representative Davis's appearance in the PSAs are whether:

- Funds raised through the announcements are in connection with a federal or nonfederal election; and
- The PSAs fall within the definition of a "coordinated communication" and, thus, trigger payment or reporting obligations for Representative Davis.

Solicitations. Under the Act, federal candidates are generally prohibited from soliciting funds in connection with a federal election that are not subject to the limits, prohibitions and reporting requirements of the Act. Federal candidates and officeholders are also prohibited from raising funds in connection with a nonfederal election unless those funds are subject to the Act's limits and source prohibitions. 2 U.S.C. §441i(e) and 11 CFR 300.61 and 300.62. However, if the funds raised are not in connection with a federal or nonfederal election, then the Act's prohibitions at section 441i(e) do not apply. See AO 2003-20. In this case, the funds raised through the tournament are solely for charitable uses and are not in connection with any federal or nonfederal election.

Coordinated communication. The Act defines as an in-kind contribution an expenditure made by any person "in cooperation, consultation, or concert with, or at the request or suggestion of" a candidate, his or her authorized committee or their agents. 2 U.S.C. §441a(a)(7)(B)(i). The Commission's coordinated communication regulation sets forth a three-pronged test to determine whether an expenditure for a communication becomes an in-kind contribution as a result of coordination between a person making an expenditure and a candidate. A payment for a communication that satisfies all three prongs will constitute an in-kind contribution. The first prong of the test is that the communication must be paid for by a "person" other than the federal candidate, the candidate's authorized committee or their agents, and the second two prongs set out a series of content and conduct standards.

The Davis PSAs do not meet the first prong of the coordinated communication test because Davis's Congressional office will pay for the taping of the announcements—the only costs identified in the request for the PSAs. The Act specifically exempts the federal government or any of its authorities from the definition of "person." 2 U.S.C. §432(11); see also 11 CFR 100.10. Because the use of federal government resources by Representative Davis's Congressional office does not qualify as a payment by a person for a communication, these PSAs fail the three-pronged test and do not qualify as coordinated communications.[1] Thus, no in-kind contribution results from the costs of the PSAs, and Representative Davis will not incur any obligations under the Act from his participation in the announcements.

Similarly, because neither Representative Davis nor the Foundation—nor any other person—will pay to cablecast the announcements, the PSAs do not qualify as electioneering communications, which are limited to communications "disseminated for a fee." 11 CFR 100.29(b)(3)(i). Thus, the PSA's are not coordinated electioneering communications, which are also considered in-kind contributions. 2 U.S.C. §441a(a)(7)(C).

[1] *Because all three prongs must be satisfied for a communication to constitute a "coordinated communication," the Commission did not examine the second and third prongs of the test.*

Dissenting Opinion

Commissioner Thomas issued a dissenting opinion on June 14, 2004.

Date Issued: June 10, 2004; Length: 4 pages.

—*Amy Kort*

AO 2004-15 Film Ads Showing Federal Candidates Are Electioneering Communications

Television and radio commercials featuring a Presidential candidate to promote a documentary film would constitute electioneering communications if they air within 60 days before the general election or within 30 days before a primary election or national nominating convention and could be received by more than 50,000 people. 2 U.S.C. §434(f)(3) and 11 CFR 100.29. Ads that constitute electioneering communications may not be paid for by corporations or labor organizations and may trigger reporting obligations. 2 U.S.C. §§434(f) and 441b(b)(2); 11 CFR 104.20, 114.2(b)(2)(iii) and 114.14(b).

Background

Under the Federal Election Campaign Act (the Act) and Commission regulations, an electioneering communication is defined, with some exceptions, as any broadcast, cable or satellite communication that refers to a clearly identified federal candidate and is publicly distributed for a fee within 60 days before the general election or 30 days before a primary election or a nominating convention for the office sought by the candidate. 2 U.S.C. §434(f)(3) and 11 CFR 100.29. For Presidential and Vice Presidential candidates, "publicly distributed" means that the communication can be received:

- By 50,000 people or more in a state where a primary election or caucus is being held within 30 days;
- By 50,000 people or more anywhere in the U.S. from 30 days prior to the convention until the end of the convention; or
- Anywhere in the U.S. within 60 days before the general election. 2 U.S.C. §434(f)(3)(A)(i) and 11 CFR 100.29(b)(3)(ii).

David T. Hardy, President of the Bill of Rights Educational Foundation (the Foundation), is producing a documentary film that focuses on the Bill of Rights. The request stated that the Foundation qualifies as a nonprofit corporation under Section 501(c)(4) of the Internal Revenue Code. The film will include some footage of federal officeholders who are also candidates, including President Bush. Mr. Hardy and the Foundation plan to air radio and television ads for a fee in order to promote the film's distribution. The ads will not be received in the districts of Congressional candidates who are clearly identified in the ads, but at least one Presidential candidate will be featured.

Analysis

Ads that refer to at least one Presidential candidate, are publicly distributed within the electioneering communication periods and can reach at least 50,000 people will meet all of the elements that define an electioneering communication. None of the statutory or regulatory exemptions for electioneering communications will apply to the ads in this opinion.[1] Moreover, Mr. Hardy did not assert that the Foundation was entitled to a media exemption under the Act, and, thus, the Commission made no finding with respect to the application of the media exemption in this opinion. 2 U.S.C. §434(f)(3)(B)(i). Thus, the ads will be subject to the prohibitions and reporting requirements for electioneering communications.

As a corporation, the Foundation may not finance ads that constitute electioneering communications.[2] However, Mr. Hardy may pay for the ads himself, and he must comply with the Act's reporting requirements for electioneering communications that aggregate in excess of $10,000 in a calendar year. 2 U.S.C. §§434(f) and 441b(b)(2) ; 11 CFR 104.20.

Date Issued: June 25, 2004; Length: 4 pages.

—Amy Kort

AO 2004-17
Federal Candidate's Compensation for Part-Time Employment

Payments that Becky A. Klein, a Congressional candidate, receives as compensation for part-time consulting services rendered to a law firm are not contributions to Ms. Klein's campaign. The payments from the law firm will be for services actually rendered, and they are excepted from the definition of "contribution" because they qualify as compensation made irrespective of her candidacy.

Background

Ms. Klein is a U.S. House candidate, and she intends to accept part-time employment providing consulting services, based on her experience as Chairman of the Texas Public Utility Commission, to a law firm. The law firm will pay her on an hourly basis for services actually rendered, and the rate of compensation will be comparable to that earned by similarly qualified consultants for similar services. Her work for the law firm will be independent of her campaign, and she will not use the firm's facilities—nor those of any of the firm's clients—for campaign-related activity.

Analysis

The Federal Election Campaign Act (the Act) prohibits the conversion of campaign funds to any "personal use." 2 U.S.C. 439a. Under Commission regulations, a third party's payment of a candidate's expenses that would otherwise be deemed "personal use" expenses is considered a contribution by the third party, unless the payment would have been made "irrespective of the candidacy." 11 CFR 113.1(g)(6). See also 2 U.S.C. 439a(b)(2). The regulations state that employment-related compensation is considered a contribution unless the compensation:

- Results from *bona fide* employment that is genuinely independent of the candidacy;
- Is exclusively in consideration for services provided by the employee as part of his or her employment; and
- Does not exceed the amount of compensation that would be paid to any other similarly qualified person for the same work over the same time period. 11 CFR 113.1(g)(6)(iii)(A), (B) and (C).

Ms. Klein's proposal meets all three of these requirements. The consulting services arrangement is a *bona fide* employment, and it is genuinely independent of her candidacy. The proposed hourly rate of compensation is exclusively tied to services actually rendered and is not more than what is paid to similarly qualified consultants who perform

[1] Exceptions might apply if a communication was disseminated through means other than broadcast, cable or satellite communication, was a reportable expenditure or independent expenditure, was a candidate debate forum or a promotion of such an event, was a communication by local or state candidates or was made by a charitable organization under 26 U.S.C. 501(c)(3). 11 CFR 100.29(c).

[2] While qualified nonprofit corporations (QNC), as described in 11 CFR 114.10, are exempt from the prohibition on corporate payments for electioneering communications, the Foundation does not qualify as a QNC under Commission regulations.

similar services. Thus, the payments will be made "irrespective of candidacy" and will not be contributions to Ms. Klein's campaign under the Act or Commission regulations.[1]

Date Issued: June 24, 2004; Length: 4 pages.

—Amy Kort

AO 2004-18 Campaign Committee's Purchase of Candidate's Book at Discounted Price

The Friends of Joe Lieberman Committee (the Committee) may buy copies of Senator Joseph Lieberman's book at a discounted price that will be made available to other purchasers under a customary practice in the publishing industry. The books will be given to campaign supporters and contributors.

Background

Under Senator Lieberman's publishing contract, if the publisher determines that his book is no longer "readily saleable at regular prices within a reasonable time," it may designate its remaining stock of copies as "remainder copies" and sell them at a steep discount. The publisher recently made this determination and, pursuant to the publishing contract, offered the book to Senator Lieberman at a discounted price of $3.40 per copy before offering this price to other buyers. The Committee intends to purchase a few hundred of the thousands of remaining copies in order to distribute them as gifts to campaign supporters. The Committee will not otherwise promote or sell the book. Senator Lieberman will waive any potential royalties or royalty credits that might result from this purchase.

Analysis

In-kind contributions. Under the Federal Election Campaign Act (the Act), a contribution includes the provision of goods or services at less than the usual and normal charge—in other words, at less than the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution. 11 CFR 100.52(d)(1) and (2). In the past, the Commission has determined that the purchase of goods or services at a discount does not result in a contribution when the discounted items are made available in the ordinary course of business and on the same terms and conditions to the vendor's other customers that are not political committees. See AOs 2001-8, 1996-2, 1995-46 and 1994-10.

In this case, the practice of discounting books when they are no longer saleable at the regular price is standard in the publishing industry. In addition, the publisher set the price for the remainder copies of Senator Lieberman's book in the ordinary course of its business based on its estimation of the fair market value of the book as a remainder. Thus, the Committee will pay the usual and normal charge for this type of purchase, and no in-kind contribution will result.

Personal use of campaign funds. The Act provides for four categories of permissible uses of campaign funds, including otherwise authorized expenditures that are made in connection with the candidate's federal campaign. 2 U.S.C. §439a(b)(1) and 11 CFR 113.2(a), (b) and (c). In no case, however, may campaign funds be used for an expense that would exist irrespective of the candidate's campaign or duties as a federal officeholder, and thus be converted to "personal use." 2 U.S.C. §439a(b)(1) and 11 CFR 113.1(g).

In this case, the funds will be used for an otherwise authorized expenditure made in connection with Senator Lieberman's campaign, and the expense would not exist irrespective of the campaign because:

- The books will only be used as gifts to campaign supporters and the Committee will not promote or sell the book; thus, the Committee will use them only for the purpose of influencing Senator Lieberman's re-election to federal office;
- The Committee will not buy more books than it needs for this purpose; and
- Senator Lieberman will not receive any royalties or royalty credits as a result of the Committee's purchase of the books, nor will the purchase increase his opportunity to receive future royalties.[1]

Thus, the Committee's purchase of the books is permissible under the Act and Commission regulations. The Committee should report funds it spends on the books as operating expenditures for the 2006 election cycle. 2 U.S.C. §§434(b)(4)(A) and (5)(A); 11 CFR 104.3(b)(2)(i) and (b)(4)(i).

Date Issued: July 15, 2005; Length: 7 pages.

—Amy Kort

[1] The Commission noted that Ms. Klein's situation seemed virtually indistinguishable from that presented in AO 1979-74, which was the culmination of a series of advisory opinions reaffirming that "an individual may pursue gainful employment while a candidate for Federal office" and establishing and refining the criteria for when compensation received by a candidate would not be a contribution from the employer. The three part test in AO 1979-74 was subsequently codified in Commission regulations at 11 CFR 113.1(g)(6)(iii).

[1] Although the personal use regulations permit a candidate to rent space, equipment or other items to his principal campaign committee at the usual and normal charge, Senator Lieberman's waiver of royalties and royalty credits that would otherwise result from the sale of copies of his book to the Committee precludes the use of the sale as a device to use the Committee to benefit him financially. See 11 CFR 113.1(g)(1)(i)(E) and AOs 2001-8 and 1995-46.

AO 2004-19
Earmarked Contributions to Candidates via a Web Site

An incorporated web site operator may receive and forward earmarked contributions to federal candidates because it satisfies both the "commercial vendor" exception to the ban on corporate facilitation of contributions at 11 CFR 114.2(f)(1), and the "commercial fundraising firm" exception to the definition of "conduit or intermediary" in 11 CFR 110.6(b)(2).

Background

DollarVote.org (DollarVote), a Virginia C corporation, proposed a two-part plan to accept and forward contributions from individuals to candidates in upcoming elections. Under the Plan, individuals are granted access to the DollarVote web site upon paying an annual subscription fee. The web site contains various position statements on political issues. The position statements are referred to as "DollarBills," and participating candidates may post "promises" on the site to support the statements of their choice. Individuals may then view the DollarBills and "vote" to contribute funds to the candidate(s) who have promised to support an issue. If no candidate has promised to support an issue at the time of an individual's vote, the contributed funds would go to the first future candidate who registers a promise in support of that DollarBill. The individual may stipulate additional criteria for the future recipient candidate, such as excluding particular candidates by name and including only candidates belonging to a certain political party, among other conditions. The contributor also selects a 501(c)(3) organization to be the recipient of the funds, should no candidate meet the individual's selected criteria. If multiple candidates promise on the same DollarBill, contributions will be distributed equally.

Along with the annual subscription fee, DollarVote will charge contributors a small processing fee for each transaction. Candidates will also be charged a fee for the ability to register promises on the site.[1] These monies will go into the corporation's general account, which will be separate from the merchant accounts established to hold earmarked contributions.

The Plan also contains screening and processing measures to prevent excessive contributions and contributions from prohibited sources under the Act.

Analysis

Commercial vendor exception. Corporations are prohibited from making any contribution or expenditure in connection with a federal election. 2 U.S.C. §441b(a). Corporations are further prohibited from facilitating the making of contributions to candidates or political committees. 11 CFR 114.2(f)(1). A corporation does not facilitate the making of a contribution to a candidate, however, if the corporation provides a service in the ordinary course of business as a commercial vendor. DollarVote would be operating permissibly as a commercial vendor under 11 CFR 114.2(f)(1), because:

1. Its services are rendered for the usual and normal charge paid by authorized candidate committees;
2. DollarVote forwards earmarked contributions to candidates through separate merchant accounts; and
3. DollarVote's web site incorporates adequate screening procedures to ensure it is not forwarding illegal contributions.

See also AO 2002-7.

[1] *The fee, terms and conditions will be the same for all participating candidates, and the fee will be set so that DollarVote will receive the usual and normal charge for its services. DollarVote will not deny participation to any candidate who meets the payment and eligibility requirements.*

Commercial fundraising firm exception. Commission regulations state that any person prohibited from making contributions or expenditures is also prohibited from acting as a conduit or intermediary for earmarked contributions. 11 CFR 110.6(b)(2)(ii). As a corporation, DollarVote must meet the regulatory exception to the definition of "conduit or intermediary" in order to conduct the activities in its Plan. Commission regulations at 11 CFR 110.6(b)(2)(i)(D) establish an exception for "a commercial fundraising firm retained by the candidate or the candidate's authorized committee to assist in fundraising." As a commercial vendor that is retained by candidates to assist in raising funds for their campaigns and exercises no discretion over the contributions, DollarVote meets this exception.

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—Meredith Trimble

AO 2004-22
Unlimited Transfers to State Party Committee

U.S. Representative Doug Bereuter, a retiring member of Congress, may make unlimited transfers of campaign funds to the Nebraska State Republican Party (the Party). The Party, in turn, may use these funds to renovate its office building. Under the Federal Election Campaign Act (the Act), transfers to a state party committee are a permitted use of contributions received by a principal campaign committee. 2 U.S.C. §439a.

Background

Representative Bereuter resigned from the U.S. House of Representatives and will not run for re-election. His principal campaign committee, Bereuter for Congress, recently transferred $5,000 from its campaign account to the Party to defray the costs of remodeling the Party's office building. Bereuter for Congress intends to transfer another $10,000

to $15,000 to fund further remodeling.

Analysis

The Act lists four permissible uses for campaign funds and provides that campaign funds must not be converted to the personal use of any individual. 2 U.S.C. §§439a and 439a(b). One permissible use of funds is for unlimited transfers to a state party committee. 2 U.S.C. §439a(a)(4); 11 CFR 113.2(c). These provisions of the Act do not limit the ways that the state party committee can use the funds, nor do they restrict the amount that may be transferred in any specific period of time.[1]

Thus, Bereuter for Congress may transfer $10,000 to $15,000 in campaign funds to the Party for the purpose of remodeling its party headquarters. Any or all of the funds may be transferred before August 31, 2004.

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—*Amy Kort*

AO 2004-25
Senator May Donate Personal Funds to Voter Registration Organizations

U.S. Senator and Democratic Senatorial Campaign Committee (DSCC) Chairman Jon Corzine may donate his personal funds to organizations engaging in voter registration activity, as defined at 11 CFR 100.24(a)(2),[1] without triggering the Federal Election Campaign Act's (the Act) provisions regulating the raising and spending of funds by officers of national party committees and federal candidates or officeholders.[2] Senator Corzine will make the donations solely at his own discretion, without authority from, or on behalf of, the DSCC. He will not donate to organizations that he has directly or indirectly established, financed, maintained or controlled, and he will not exercise any control of how his funds are used by any organization to which he donates.

Status as National Party Committee Officer

The Act bars officers and agents of a national party committee from raising or spending any nonfederal funds (i.e., funds not subject to the limitations, prohibitions and reporting requirements of the Act). 2 U.S.C. §441i(a); 11 CFR 300.2(k) and 300.10. It also restricts national party committees, their officers and agents from raising and spending funds for nonprofit organizations under 26 U.S.C. §501(c) that make expenditures and disbursements in connection with an election for federal office (as well as restricting them from raising and spending funds for certain political organizations under 26 U.S.C. §527). 2 U.S.C. §441i(d); 11 CFR 300.11 and 300.50. The plain language of the Act and the Commission's regulations, however, specifically applies these restrictions to national party committee officers and agents only when such individuals are acting on behalf of the national party committee. See 2 U.S.C. §§441i(a) and (d); 11 CFR 300.10(c)(1), 300.11(b)(1) and 300.50(b)(1).[3]

Based on the request's representation that Senator Corzine's donation of personal funds[4] will be made solely at his own discretion, without express or implied authority from, or on behalf of, the DSCC, the Commission concluded that Senator Corzine would not be acting on behalf of the DSCC, and thus would not be restricted by the aforementioned provisions from donating unlimited personal funds to organizations that engage in voter registration activity, as defined in the federal election activity (FEA) provisions of Commission regulations. See 11 CFR 100.24(a)(2). If any of those organizations, however, qualifies as a political committee, his donations to it would be considered contributions subject to the same dollar limitations as any other individual (i.e., $5,000 per calendar year).

Status as Federal Candidate or Officeholder

The Act and Commission regulations similarly restrict federal candidates and officeholders in their ability to raise and spend funds in connection with an election for fed-

[1] *A transfer pursuant to 2 U.S.C. §439a(a)(4) and 11 CFR 113.2(c) is not subject to the contribution limitation in 2 U.S.C. §441a(a)(1)(D) or 11 CFR 110.1(c)(5). Such a transfer is also consistent with the regulations addressing office buildings of state or local party committees in 11 CFR 300.35.*

[1] *As defined at 11 CFR 100.24(a)(2), "voter registration activity" means contacting registered voters by phone, in person or by other individualized means to assist them in registering to vote. This activity includes, but is not limited to, printing and distributing registration and voting information, providing individuals with voter registration forms and helping them to fill out these forms.*

[2] *These rules generally provide that a national party committee and a federal candidate/officeholder may only solicit, receive, direct, transfer or spend funds in connection with an election for federal office—including funds for "federal election activity"—if those funds are federal funds that are subject to the limits, prohibitions and reporting requirements of the Act. See 2 U.S.C. §§441i(a) and (e)(1)(A). See also 11 CFR 100.24.*

[3] *In* McConnell v. Federal Election Commission, *540 U.S. __, 124 S.Ct. 619 at 658, 668, 679 (2003), the Supreme Court acknowledged that these provisions do not apply to officers acting in "their individual capacities."*

[4] *See 2 U.S.C. §431(26) and 11 CFR 300.33 for a definition of the term, "personal funds."*

eral office. Specifically, the law and regulations stipulate that no federal candidate or officeholder shall solicit, receive, direct, transfer, spend or disburse funds in connection with an election for federal office, including funds for any FEA,[5] unless the funds consist of federal funds that are subject to the limitations, prohibitions and reporting requirements of the Act. 2 U.S.C. §441i(e)(1)(A); 11 CFR 300.61.

Unlike the restrictions regarding national party committees, the Act and regulations do not explicitly limit application of the restrictions to when such an individual is acting in his or her official capacity. The language of section 441i, however, is not clear as to whether the restrictions on the use of funds extend to the personal funds of federal candidates or officeholders, and there is no legislative history suggesting that Congress intended them to extend in such a way. Moreover, the underlying anti-corruption purposes of the section 441i restrictions, and their accompanying regulations, are not furthered by restricting such individuals from spending their personal funds solely at their own discretion, as opposed to funds that are solicited or received from others at the behest of the federal candidate or officeholder.

Because the funds Senator Corzine plans to donate would not be solicited or received from others, he would not incur an obligation toward any other person that would raise concerns regarding corruption or the appearance thereof. Thus, Senator Corzine may donate his personal funds in amounts exceeding the Act's limits to organizations that engage in FEA, irrespective of his status as a federal candidate or officeholder. In reaching this conclusion, the Commission assumes that Senator Corzine's donations to each organization will not be in amounts that are so large or comprise such a substantial percentage of the organization's receipts that the organization would be considered to be "financed" by Senator Corzine. See 2 U.S.C. §441i(e)(1); 11 CFR 300.61. Again, however, if any of those organizations qualifies as a political committee, his donations to it would be considered contributions subject to the same dollar limitations as any other individual (i.e., $5,000 per calendar year).

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—Dorothy Yeager

[5] *Under the Act, the term "federal election activity" includes "voter registration activity" that occurs during the period beginning 120 days before the date of a regularly scheduled federal election and ending on the date of the election. 2 U.S.C. §431(20); See 11 CFR 100.24(a)(2) and(b)(1).*

AO 2004-26 Foreign National's Participation in Political Committee Activities

A foreign national may participate in campaign activities as an uncompensated volunteer, but may not participate in the decision-making process of political committees.

Background

Ms. Zury Rios Sosa, a foreign national and member of the Guatemalan legislature, is engaged to marry U.S. Representative Gerald C. Weller. Representative Weller maintains two affiliated campaign committees—Jerry Weller for Congress, Inc. and Gerald C. 'Jerry' Weller for Congress—and is the honorary chair of Reform PAC, a nonconnected, multicandidate committee (collectively, the Committees).

Given the ban on contributions by foreign nationals, Representative Weller and Ms. Rios Sosa asked whether she could participate in the following activities:

1. Attending Committee events;
2. Speaking or soliciting funds and support at Committee events;
3. Participating in event planning and strategy sessions with Representative Weller and Committee personnel; and
4. Accompanying Representative Weller to other committees' fundraising and campaign events.

Analysis

Foreign national volunteer activity. The Act and Commission regulations prohibit foreign nationals, directly or indirectly, from making a "contribution or donation of money or other thing of value…in connection with a Federal, State, or local election." 2 U.S.C. §441e(a)(1)(A) and 11 CFR 110.20(b). The term "contribution," however, does not include the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee. 2 U.S.C. §431(8)(B)(i) and 11 CFR 100.74. In AO 1987-25, the Commission concluded that a foreign student's work for a campaign without compensation would not result in a prohibited contribution because the value of volunteer services was specifically exempt from the Act's definition of contribution.[1] Similarly, the volunteer activities proposed by Ms. Rios Sosa would not result in the making of a prohibited contribution.

Foreign national participation in decision-making. Commission regulations prohibit foreign nationals from participating in the decisions of any person involving election-related activities. 11 CFR 110.20(i). This prohibition encompasses participation in the decision-making process of any person or committee concerning the making of contributions, donations, expenditures or disbursements in connection with elections, as well as involvement in decisions concerning the manage-

[1] *Compare AO 1978-25 with AO 1981-51, which concluded that the Act prohibits an artist who is a foreign national from donating his uncompensated services to create an original art work for a political committee's use in fundraising.*

ment of any political committee. Therefore, Ms. Rios Sosa must not participate in Congressman Weller's decisions regarding his campaign activities. She must also refrain from managing, or participating in the decisions of, the Committees.

With regard to the four types of activities specified above, Ms. Rio Sosa may, as an uncompensated volunteer, attend Committee events, solicit funds from permissible sources under the Act and give speeches at the events as long as she does not participate in the Committees' decision-making processes. Ms. Rios Sosa may also attend meetings regarding Committee events and strategy, but may not be involved in the management of the Committees. Finally, Ms. Rios Sosa may attend fundraising and campaign events of other political committees, provided she does not make a contribution of her personal funds in order to attend. Participation in such events is subject to the same restrictions detailed above.

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—Meredith Trimble